

Office of the State Appellate Defender  
**Illinois Criminal Law Digest**

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## ACCOUNTABILITY

### §1-4

**People v. Cowart**, 2015 IL App (1st) 113085 (No. 1-11-3085, 2/9/15)

Under the common design rule of accountability, where two or more people engage in a common criminal design, any acts in furtherance of that common design are considered to be the acts of all the members, and they are all legally responsible for the consequences of those acts. The Appellate Court reversed defendant's conviction for first degree murder holding that there was no evidence that defendant or anyone he was accountable for under a theory of common design fired the shot that killed Lee, the deceased victim.

The evidence showed that a fight broke out at a large street party attended by 100 - 200 people. During the fight, which involved numerous individuals, defendant punched a woman in the face, and later fired shots at some of the women he was fighting with. Several men associated with defendant also fired shots at the women. Many other men at the party who were not associated with defendant had guns and fired shots.

At some point during the melee, Lee was shot in the back and killed. Several people were standing near Lee and fired guns, but the person who fired the fatal shot was never identified. The State's evidence thus showed that defendant and his associates shot at the group of women they were fighting with, but did not show that any of these shots hit Lee by accident.

To establish a common criminal design resulting in murder, however, the State had to prove that Lee's unknown shooter shared defendant's common design to shoot at the women, but instead shot Lee by accident. The State failed to show this and thus failed to prove that defendant was accountable for Lee's murder.

(Defendant was represented by Assistant Defender Chris Gehrke, Chicago.)

## APPEAL

### §2-2(b)

**People v. Norton**, 2015 IL App (2d) 130599 (No. 2-13-0599, 2/19/15)

The court found that it lacked jurisdiction to consider a successive post-conviction petition raising ineffective assistance of counsel where the trial court's resolution of that motion delayed the notice of appeal more than 30 days after the first post-judgment motion was denied and past the point at which the Appellate Court could grant leave to file a late notice of appeal under Illinois Supreme Court Rule

606(c). The court acknowledged that the trial court erroneously advised defendant and counsel that a successive post-judgment motion raising ineffective assistance tolled the time for filing a notice of appeal, but found that it lacked authority to exercise jurisdiction over the appeal.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

## **§2-5(b)**

**People v. Shines**, 2014 IL App (1st) 121070 (No. 1-12-1070, 2/4/15)

More than 30 days after he had been sentenced, defendant filed a *pro se* letter titled “motion of appeal” in the trial court alleging that counsel had been ineffective. The trial court took no action on the letter. The Illinois Supreme Court eventually granted defendant’s motion for supervisory order directing the Appellate Court to allow defendant’s letter “to stand as a validly filed notice of appeal.”

Defendant argued on appeal that the trial court failed to conduct a **Krankel** hearing on defendant’s *pro se* claims of ineffectiveness. The Appellate Court held that since defendant’s letter was filed more than 30 days after the final judgment, the trial court no longer had jurisdiction to rule on defendant’s claims. The trial court entered the final judgment on March 7 when it sentenced defendant and lost jurisdiction on April 6. Defendant filed his letter on April 9, more than 30 days after the final judgment had been entered.

Defendant argued that his letter was timely filed under the mailbox rule, which holds that pleadings are timely filed on the day an incarcerated defendant places them in the prison mail system. In support of his argument, defendant asked the Appellate Court to take judicial notice of an affidavit from a paralegal who averred that a manager at the prison where defendant was incarcerated informed her that defendant’s letter was mailed on April 3. Defendant attached the affidavit, which had originally been submitted with his motion for supervisory order, as an exhibit to his reply brief.

The court refused to take judicial notice of the affidavit. It held that it could not properly consider attachments to briefs that were not included in the record. Additionally, the content of the affidavit was entirely hearsay and thus insufficient to establish the date of mailing.

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

**§2-6(a)**

**In re Austin S.**, 2015 IL App (4th) 140802 (No. 4-14-0802, 2/9/15)

The public interest exception to the mootness doctrine allows a court to consider a moot issue when: (1) the issue is of a public nature; (2) an authoritative decision is needed to guide public officers; and (3) the issue is likely to recur. There must be a clear showing of each element for the public interest exception to apply.

Here the issue was whether the trial court's order requiring defendant to complete a Juvenile Detention Center Treatment Program was impermissible because it violated the 30-day limitation on detention under 705 ILCS 405/5-710(1)(a)(v). By the time the case reached the Appellate Court, defendant had completed his sentence and both parties agreed the issue was moot. The court nonetheless reached the issue under the public interest exception, holding that all three elements of the exception were satisfied.

First, the issue was of a public nature since it involved a question about the permissible length that a minor may be detained. Second, an authoritative decision was needed because it was an issue of first impression and it implicated the minor's liberty interest. Third, the issue was likely to recur because minors will continue to be sentenced to the treatment program at issue.

(Defendant was represented by Assistant Defender Janieen Terrance, Springfield.)

**§2-6(a)**

**People v. Bernard**, 2014 IL App (2d) 130924 (No. 2-13-0924, mod. op. 2/10/15)

Other than deciding whether it has jurisdiction, a reviewing court normally will not search the record for unargued and unbriefed reasons to reverse the trial court. Instead, courts normally only decide questions presented by the parties. But under Illinois Supreme Court Rule 366(a)(5), a reviewing court "may, in its discretion, and on such terms as it deems just...make any other or further orders and grant any relief, including a remandment...that the case may require."

Here, the trial court denied defendant's motion to withdraw her guilty plea and defendant appealed. The Appellate Court remanded the case back to the trial court because of a Rule 604(d) violation. Although defendant filed a new motion to withdraw, the trial court again denied the defendant's motion because the original motion had not been timely filed.

Defendant did not raise any issue about the trial court erroneously denying the post-remand motion based on reasons that would only apply to the original motion. The

Appellate Court, however, addressed the issue on its own, stating that it had “no confidence in a decision that is so obviously based on a confused and incorrect understanding of the status of the case.” The case was remanded for a new hearing on the motion to withdraw.

## **ATTEMPT**

### **Ch. 5**

**People v. Boyce**, 2015 IL 117108 (No. 117108, 2/20/15)

An attempt occurs where, with intent to commit a specific offense, a person performs any act that constitutes a substantial step toward the commission of that offense. (720 ILCS 5/8-4(a)) The general attempt provision applies to all offenses unless the legislature intended that a more specific crime include attempt or application of the attempt statute to a principal offense would create an inherent impossibility. Legislative intent that a more specific crime includes attempt is shown by the inclusion of explicit “attempt” language in the definition of the specific offense.

The court concluded that under Illinois law uncommunicated requests to commit a crime do not constitute solicitation of murder. However, the court also found that the attempt statute applies to the offense of solicitation. Thus, a person who sends a mailed solicitation of murder which does not reach the intended recipient may be convicted of attempt solicitation.

Defendant’s conviction for attempt solicitation of murder was affirmed.

## **COLLATERAL REMEDIES**

### **§9-1(b)(1)**

**In re E.W.**, 2015 IL App (5th) 140341 (No. 5-14-0341, 2/23/15)

A juvenile prosecution for an offense that would be a felony if committed by an adult may be designated as an extended jurisdiction juvenile (EJJ) prosecution. 705 ILCS 405/5-810. An EJJ prosecution has two components. First, the trial court imposes a juvenile sentence which applies unless its terms are violated. Second, the court imposes an adult sentence that is stayed on the condition that the minor complies with the juvenile sentence.

Defendant was adjudicated delinquent after he pleaded guilty in an EJJ proceeding. After defendant entered a guilty plea on the juvenile portion of the

proceeding, a negotiated five-year probation term was imposed as the juvenile sentence. Defendant then entered an open plea to the adult portion of the EJJ proceeding. The trial court imposed an adult sentence of 15 years imprisonment and lifetime MSR.

Defendant was subsequently found to have violated the conditions of the juvenile probation term on the ground that he failed to comply with sex offender counseling when he refused to admit that he was guilty of acting in an inappropriate manner. The trial court revoked the juvenile sentence and imposed the 15-year adult sentence.

1. The court concluded that where the juvenile sentence was revoked and the adult sentence placed in effect, the minor had standing under the Post-Conviction Hearing Act to challenge the voluntariness of his guilty plea. Although the Post-Conviction Hearing Act is not generally applicable in juvenile proceedings, when the trial court imposed an adult prison sentence the case was brought within the scope of the post-conviction act.

2. In addition, the post-conviction petition presented the gist of a constitutional issue in that the minor's plea was involuntary due to the trial court's failure to give proper admonishments during the juvenile portion of the plea. The court found that defendant was improperly admonished concerning the right to a jury trial, the minimum and maximum sentences, the MSR requirement, and the right to persist in a plea of not guilty. The court acknowledged that during the guilty plea admonishments for the adult sentence the trial court attempted to correct the erroneous admonishments that had been made in the juvenile portion of the proceeding. However, it concluded that the errors were not corrected where the minor had already entered his plea on the juvenile portion and was not asked whether he wished to persist in that plea.

The trial court's order summarily dismissing the post-conviction petition was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Deputy Defender Amanda Horner, Mt. Vernon.)

### **§§9-1(h)(2), 9-1(o)(3)**

**People v. Cowart**, 2015 IL App (1st) 131073 (No. 1-13-1073, 2/17/15)

1. Defendant filed a post-conviction petition attacking his guilty plea by arguing that the trial court failed to properly admonish him that he would have to register as a sex offender. The State argued that defendant forfeited this issue by failing to raise it on direct appeal.



The Appellate Court rejected the State's argument. Post-conviction claims that could have been raised on direct appeal are forfeited, but the failure to file any appeal at all does not forfeit such issues. For purposes of post-conviction forfeiture, a summary remand on direct appeal for non-compliance with Rule 604(d) is treated as if defendant filed no appeal at all. Here, on direct appeal, defendant's case was remanded for compliance with Rule 604(d) and thus his direct appeal was the equivalent of filing no appeal at all. Defendant therefore did not forfeit his post-conviction claim.

2. The court also rejected the State's argument that defendant's second-stage post-conviction petition was properly dismissed because he provided no affidavits or other support for his claims. The State forfeits a non-jurisdictional procedural challenge to a post-conviction petition by failing to raise that challenge in its motion to dismiss.

Here the State made no argument in its motion to dismiss about the lack of affidavits or other support for defendant's claim. The court noted that had the State raised this issue in the circuit court, defendant could have supplied the affidavits. By failing to raise this issue, the State forfeited its argument on appeal.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)

#### **§9-1(j)(2)**

**People v. Cotto**, 2015 IL App (1st) 123489 (No. 1-12-3489, 2/11/15)

The majority follows **People v. Csaszar**, 2013 IL App (1st) 100467, and holds that the Post-Conviction Hearing Act does not require privately retained counsel to provide reasonable assistance. The dissent would follow **People v. Anguiano**, 2013 IL App (1st) 113458, and hold that the Act requires all attorneys, whether appointed or privately retained, to provide reasonable assistance.

(Defendant was represented by Assistant Defender Emily Hartman, Chicago.)

#### **§9-5(d)**

**People v. Smith**, 2015 IL 116572 (No. 116572, 2/5/15)

1. Under **Teague v. Lane**, 489 U.S. 288 (1989), a "new" rule of criminal procedure applies to cases which were final when the new rule was announced only if the rule: (1) places certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe, or (2) requires the observance of procedures that are implicit in the concept of ordered liberty. Although **Teague**

involved federal constitutional principles, the same analysis applies to non-constitutional rules.

A “new” rule is one which breaks new ground or imposes a new obligation on a State or the federal government. A rule is “new” when it is not dictated by precedent which existed when the conviction became final. A rule is “dictated by precedent” only if it would have been “apparent to all reasonable jurists.”

2. In **People v. White**, 2011 IL 109616, the Supreme Court held that where the factual basis for a plea agreement is accepted by the trial court and establishes that the defendant is subject to a mandatory sentencing enhancement, the court must impose the mandatory enhancement even if the plea agreement provides otherwise. The court concluded that **White** created a “new” rule because it had been uncertain whether the trial court was required to give effect to a factual basis which would necessitate the imposition of a sentencing enhancement if the parties had agreed not to seek the enhancement.

The court concluded that **White** did not place primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe or require the observance of procedures which are implicit in the concept of ordered liberty. Therefore, **White** did not apply retroactively.

The trial court’s order dismissing defendant’s post-conviction petition was affirmed.

(Defendant was represented by Assistant Defender Mario Kladis, Ottawa.)

## CONSPIRACY & SOLICITATION

### §11-2

**People v. Boyce**, 2015 IL 117108 (No. 117108, 2/20/15)

1. The offense of solicitation of murder occurs where, with the intent that first degree murder be committed, a person commands, encourages, or requests another to commit that offense. (720 ILCS 5/8-1.1) The Supreme Court found that the General Assembly did not intend that uncommunicated requests constitute solicitation of murder. Thus, where a solicitation is made by letter, the intended recipient must actually receive the letter in order for the crime of solicitation of murder to occur.

In the course of its holding, the court noted that the General Assembly based the solicitation statute on the Model Penal Code but declined to enact the provision of the Code which included uncommunicated solicitations within the definition of the offense.

2. An attempt occurs where, with intent to commit a specific offense, a person performs any act that constitutes a substantial step toward the commission of the specific offense. (720 ILCS 5/8-4(a)) The general attempt provision applies to all offenses unless the legislature intended that a more specific crime include attempt or application of the attempt statute to a principal offense would create an inherent impossibility. Legislative intent that a more specific crime includes attempt is shown by the inclusion of explicit “attempt” language in the definition of the specific offense.

The court concluded that the attempt statute applies to the offense of solicitation in Illinois. Thus, a person who sends a mailed solicitation which does not reach the intended recipient may be convicted of attempt solicitation.

Defendant’s conviction for attempted solicitation of murder was affirmed.

(Defendant was represented by Assistant Defender Philip Payne, Chicago.)

## **DISCOVERY**

### **§§15-1, 15-8, 15-10**

**People v. Baker**, 2015 IL App (5th) 110492 (No. 5-11-0492, 2/6/15)

Under Illinois Supreme Court Rule 415, evidence may be excluded as a sanction for a discovery violation. Factors to be considered in determining whether to exclude evidence include the effectiveness of a less severe sanction, the materiality of the witness's proposed testimony to the outcome of the case, any prejudice to the opposing party, and any evidence of bad faith. The imposition of a sanction for a discovery violation is reviewed under the abuse of discretion standard.

Where the defense produced an expert witness’s revised report two days before jury selection was to commence, and the report contained statistical information which had not been disclosed previously, the trial court did not abuse its discretion by excluding the expert from testifying. Noting that the defense failed to make an offer of proof and that it was difficult to determine the value of the statistical evidence, the court stressed that the State indicated it would need additional time to prepare for cross-examination, 120 prospective jurors had been summoned to report in two days, and witnesses had been subpoenaed. In addition, the trial had previously been continued due to a last-minute decision by the defense team to present an insanity defense and defendant failed to establish that he was unfairly prejudiced by the exclusion of the expert’s testimony. Under these circumstances, the trial court did not abuse its discretion by prohibiting the testimony.

(Defendant was represented by Assistant Deputy Defender Amanda Horner, Mt. Vernon.)

## **DISORDERLY, ESCAPE, RESISTING & OBSTRUCTING OFFENSES**

### **§16-2**

**People v. Slaymaker**, 2015 IL App (2d) 130528 (No. 2-13-0528, 2/3/15)

An individual commits the offense of resisting a peace officer where he or she resists a known officer's performance of an authorized act. Because an officer lacks authority to perform a weapons frisk during a community caretaking encounter, defendant's conviction was reversed.

(Defendant was represented by Assistant Defender Sherry Silvern, Elgin.)

## **EVIDENCE**

### **§§19-2(b)(1), 19-5**

**People v. Betance-Lopez**, 2015 IL App (2d) 130521 (No. 2-13-0521, 2/27/15)

Generally, the trial court may admit a written transcript of a recording to assist the trier of fact. However, it is the recording itself, and not the transcript, that constitutes evidence.

The court concluded that the general rule is "impractical, or even impossible," where the recording contains statements in a foreign language. In such a case, it is not possible for the trier of fact to rely on the recording to the exclusion of an English translation. Thus, where the recording contained questions and answers in Spanish which were then translated by one of the officers conducting the interrogation, the trial court did not err by admitting a subsequently prepared English transcript as substantive evidence.

The court rejected the argument that because the recording contained the officer's English translation of statements which defendant made in Spanish, the trial court should not have relied on the subsequently-prepared transcript. The court noted that the translator who prepared the transcript had the luxury of listening to the recording, multiple times if necessary, to ensure that the translation was accurate. In addition, defendant conceded that there was a proper evidentiary foundation for the transcript. Under these circumstances, the trial court did not err by admitting the transcript.

(Defendant was represented by Assistant Defender Yasmin Eken, Chicago.)

**§§19-10(d), 19-19**

**People v. McCullough**, 2015 IL App (2d) 121364 (No. 2-12-1364, 2/11/15)

1. Under Illinois Rule of Evidence 803(16) (the ancient document rule) statements in an authenticated document that has been in existence 20 years or more may be admitted as an exception to the hearsay rule. If the author of the ancient document had personal knowledge of the substance underlying the assertions in the document, the document is admissible. Although there are no Illinois cases on point, federal courts interpreting an identical federal rule of evidence are split on whether the ancient document rule allows admission of all assertions in the document, even those that involve double hearsay. Some courts require a separate hearsay exception for each layer of hearsay contained in a document, while others allow the admission of all statements in a document.

Defendant was tried in 2012 for a kidnapping and homicide that occurred in the town of Sycamore in 1957. Defendant sought admission of FBI reports that were prepared during the 1957 investigation of the case and contained evidence of an alibi that had otherwise disappeared due to the death of the witnesses. The reports contained multiple layers of hearsay (FBI agents who had no personal knowledge of the events reporting what various witnesses had told them), and they relied to a large extent on statements of defendant or his family members. The reports established that defendant had not been in Sycamore at the time of the offense.

The Appellate Court held that the reports were not admissible. The court adopted the view that each layer of hearsay requires its own hearsay exception before it is admissible. Since all the statements in the reports contained multiple layers of hearsay, the ancient document rule did not allow their admission. The court also noted that one of the bases for the ancient document rule is that statements in an ancient document are usually written before a motive to fabricate arises. But here much of the alibi was based on the statements of defendant or his family, who had a motive to fabricate at the time the FBI reports were created.

The trial court's exclusion of the reports was affirmed.

2. Under Illinois Rule of Evidence 804(b)(3), an out-of-court statement that would subject a person to civil or criminal liability is admissible. Three conditions must be met before the statement can be admitted: (1) the declarant must be unavailable; (2) the statement must be against the declarant's penal interest; and (3) the trustworthiness of the statement must be corroborated.

The trial court admitted the 1994 deathbed statement of defendant's mother that defendant "did it." The trial court agreed with the State's theory that the statement was against her penal interest since it showed that she had lied in 1957 when she told the FBI that defendant was at home at the time of the offense, and hence was subject to possible prosecution for obstruction of justice.

The Appellate Court held that the trial court erred in admitting the statement since it was not against the mother's penal interest. The court held that the statement itself must on its face be self-incriminating. The mother's statement, however, did not on its face incriminate her. Instead, to be incriminating, the State would have needed to introduce the inadmissible hearsay statement of what the mother told the FBI in 1957 and then speculate that (1) the State could have prosecuted her for obstruction of justice 37 years later as she lay dying of cancer, and (2) that she would have waived any statute of limitations bar.

Although the Appellate Court held that the statement should not have been admitted, it affirmed defendant's conviction on harmless error grounds.

(Defendant was represented by Assistant Defender Paul Glaser, Elgin.)

### **§19-22(c)**

**In re S.M.**, 2014 IL App (3d) 140687 (No. 3-14-0687, 2/4/15)

1. Defendant was charged in juvenile court with unlawful possession of a concealable handgun by a person under 18 years of age. 720 ILCS 5/24-3.1(a)(1). The State did not present any evidence establishing defendant's age, which was an element of the offense. During closing argument, defendant pointed out this failure, and in rebuttal the State asked the trial court to take judicial notice of the court record showing that the court's juvenile jurisdiction attached for minors under 18 years of age. The trial court agreed with the State, finding that as a matter of jurisdiction defendant was under 18, otherwise he would have been tried in adult court.

2. The Appellate Court reversed defendant's adjudication, holding that the State failed to prove defendant was under 18, an element of the offense, and that the trial court could not properly fill in that missing proof by taking judicial notice of defendant's age.

Illinois Rule of Evidence 201 allows a trial court to take judicial notice of certain facts which are not subject to reasonable dispute, meaning they are generally known in the local population or are capable of accurate and ready determination by consulting sources of unquestioned accuracy. A court may take judicial notice of its own records, including the status of pleadings in a juvenile proceeding.

3. The State charged defendant in juvenile court, which has exclusive jurisdiction to adjudicate criminal offenses committed by minors under the age of 18, and defendant did not file a motion to dismiss the charges. But procedural silence regarding allegations in a charging document cannot be construed as a judicial admission to an element of the offense. The failure of defendant to contest specific

allegations in the charge did not absolve the State of its obligation to prove the elements of an offense.

Additionally, defendant's age was not technically a jurisdictional requirement since juvenile court is simply a division of the circuit court. Defendant's silence with respect to jurisdiction thus did not constitute an admission that he was under 18 at the time of the offense.

4. The Appellate Court rejected the State's argument, made for the first time on appeal, that the trial court could fill in the State's missing proof by taking judicial notice of defendant's unsworn statement during arraignment that he was 16 years old. Not only was the statement unsworn, it was also self-incriminating, since defendant gave the answer in response to a direct question from the court about his age, an element of the offense. If this statement could be considered on appeal to provide the necessary proof of age, it would prevent defendant from any meaningful opportunity to challenge this element at trial, or to challenge the admission of his statement as violating his right against self-incrimination.

5. The Appellate Court also held that the trial court could not take judicial notice of an adjudicative fact without first reopening the evidentiary portion of the trial. Here, defendant pointed out the missing proof during its closing argument. The State was not entitled to have a "do-over" by asking the court in its rebuttal argument to supplement the completed evidence pursuant to judicial notice.

Defendant's conviction was reversed.

(Defendant was represented by Assistant Defender Lucas Walker, Ottawa.)

## **GUILTY PLEAS**

### **§24-3**

**People v. Smith**, 2015 IL 116572 (No. 116572, 2/5/15)

The court concluded that **People v. White**, 2011 IL 109616, which held that the trial court must impose a mandatory sentencing enhancement which is supported by the factual basis for a guilty plea even if the plea agreement provides that the enhancement will not be sought, imposed a "new" rule that does not apply retroactively to convictions which were already final when **White** was decided.

(Defendant was represented by Assistant Defender Mario Kladis, Ottawa.)

**§24-6(a)**

**People v. Cowart**, 2015 IL App (1st) 131073 (No. 1-13-1073, 2/17/15)

Before accepting a guilty plea, the trial court must admonish the defendant about the direct consequences of his plea; the court does not need to admonish the defendant about collateral consequences. A direct consequence “has a definite, immediate and largely automatic effect” on defendant’s punishment. Illinois courts have held that mandatory sex offender registration is a collateral consequence, since it is neither a restraint on liberty nor a punishment.

Defendant argued that the reasoning of **Padilla v. Kentucky**, 559 U.S. 356 (2010) should be extended to require a trial court to admonish a defendant who is pleading guilty about mandatory sex offender registration. In **Padilla**, the defendant argued that his trial counsel was ineffective for failing to inform him that his guilty plea made him eligible for deportation. The United States Supreme Court held that even though deportation is a civil consequence of a guilty plea, given its enmeshment with criminal law, it could not be “categorically removed” from defense counsel’s duty to provide proper advice to a client who is pleading guilty.

The Appellate Court rejected defendant’s argument. It held that unlike deportation, sex offender registration is not a punishment or restraint on liberty. Registration remains a collateral consequence and thus there was no need for admonitions about it. Additionally, **Padilla** involved an issue about ineffective assistance of counsel, not trial court admonitions. Since defendant raised no claim about ineffective counsel, **Padilla** does not change the outcome.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)

**§24-8(b)(1)**

**People v. Bernard**, 2014 IL App (2d) 130924 (No. 2-13-0924, mod. op. 2/10/15)

When defense counsel fails to file a Rule 604(d) certificate, the appropriate remedy is to remand for the filing of the certificate, the opportunity to file a new motion to withdraw if one is necessary, and a new motion hearing. Once the reviewing court remands a case for the potential filing of a new motion, the previous order denying the motion to withdraw has been vacated and is nullified, canceled, and void.

Here defendant pled guilty on December 9, 2011 and was sentenced on February 8, 2012. On February 15, 2012, defendant filed a timely motion to reduce sentence. On June 22, 2012, while the motion to reduce was still pending, defendant filed a motion to withdraw her guilty plea. The trial court denied the motion to withdraw on the alternative grounds of untimeliness and lack of merit.



Counsel failed to file a 604(d) certificate and the Appellate Court remanded for compliance with Rule 604(d). On remand, counsel filed an amended motion to withdraw. The trial court denied the new motion holding that it lacked jurisdiction to consider the motion since it had not been timely filed and defendant never asked for an extension of time.

On appeal from the second denial, the Appellate Court held that when it remanded the case for 604(d) compliance it vacated the trial court's previous order denying defendant's motion to withdraw. And when counsel filed a new motion to withdraw it superseded the previous motion.

The trial court, however, appeared confused by the status of defendant's prior motion, since it found that it lacked jurisdiction based on the untimely filing of that motion. But since the order denying the prior motion had been vacated, the trial court could not properly deny the new motion because the prior motion was untimely.

The Appellate Court remanded the case to the trial court and specifically stated that the case now returned to the trial court as it existed when defendant was initially sentenced on February 8, 2012. Since defense counsel had already filed an amended motion to withdraw following the most recent remand, "all that remains to be done...is to hold a new hearing on defendant's amended motion." If defendant determined that further amendment of the motion would be beneficial in light of the current opinion, the trial court would have discretion to grant or deny defendant leave to file such amendment.

## **HOMICIDE**

### **§26-1**

**People v. Cowart**, 2015 IL App (1st) 113085 (No. 1-11-3085, 2/9/15)

Under the common design rule of accountability, where two or more people engage in a common criminal design, any acts in furtherance of that common design are considered to be the acts of all the members, and they are all legally responsible for the consequences of those acts. The Appellate Court reversed defendant's conviction for first degree murder holding that there was no evidence that defendant or anyone he was accountable for under a theory of common design fired the shot that killed Lee, the deceased victim.

The evidence showed that a fight broke out at a large street party attended by 100 - 200 people. During the fight, which involved numerous individuals, defendant punched a woman in the face, and later fired shots at some of the women he was fighting with. Several men associated with defendant also fired shots at the women.

Many other men at the party who were not associated with defendant had guns and fired shots.

At some point during the melee, Lee was shot in the back and killed. Several people were standing near Lee and fired guns, but the person who fired the fatal shot was never identified. The State's evidence thus showed that defendant and his associates shot at the group of women they were fighting with, but did not show that any of these shots hit Lee by accident.

To establish a common criminal design resulting in murder, however, the State had to prove that Lee's unknown shooter shared defendant's common design to shoot at the women, but instead shot Lee by accident. The State failed to show this and thus failed to prove that defendant was accountable for Lee's murder.

(Defendant was represented by Assistant Defender Chris Gehrke, Chicago.)

#### **§26-7(b)**

**People v. Lewis**, 2015 IL App (1st) 122411 (No. 1-12-2411, 2/27/15)

Self-defense is an affirmative defense. Unless the State's evidence raises an issue about self-defense, the defendant bears the burden of presenting sufficient evidence to raise the issue. A defendant is entitled to a jury instruction on self-defense if "very slight" or "some" evidence supports his theory. To raise self-defense in a first-degree murder case, the defendant must admit that he killed the decedent.

The Appellate Court held that defendant was not entitled to a jury instruction on self-defense because neither the State nor the defense presented any evidence that he acted in self-defense. The State's evidence showed that defendant shot the decedent after they argued about who should be allowed to sell shoes in the parking lot of a strip mall. Nothing about the argument, however, would have justified the shooting.

The defense witnesses testified that the decedent was armed and reached for his gun, but they also testified that another person, not defendant, shot and killed the decedent. Accordingly, neither the State nor the defense presented any evidence that defendant acted in self-defense. Instead, defendant improperly attempted to combine the State's evidence that he shot the decedent with his own evidence that he feared for his safety. But since there was no direct evidence from either side that defendant acted out of a reasonable belief in self-defense, he was not entitled to a self-defense instruction.

(Defendant was represented by Assistant Defender Emily Hartman, Chicago.)

## JUVENILE PROCEEDINGS

### §33-6(e)

**In re E.W.**, 2015 IL App (5th) 140341 (No. 5-14-0341, 2/23/15)

A juvenile prosecution for an offense that would be a felony if committed by an adult may be designated as an extended jurisdiction juvenile (EJJ) prosecution. 705 ILCS 405/5-810. An EJJ prosecution has two components. First, the trial court imposes a juvenile sentence which applies unless its terms are violated. Second, the court imposes an adult sentence that is stayed on the condition that the minor complies with the juvenile sentence.

1. The court concluded that where the juvenile sentence was revoked and the adult sentence placed in effect, the minor had standing under the Post-Conviction Hearing Act to challenge the voluntariness of the plea which led to the delinquency finding. Although the Post-Conviction Hearing Act is generally not applicable in juvenile proceedings, when the trial court imposed an adult prison sentence the case was brought within the scope of the post-conviction act.

2. In addition, the post-conviction petition presented the gist of a constitutional issue in that the minor's plea was involuntary due to the trial court's failure to give proper admonishments during the juvenile portion of the plea.

The trial court's order summarily dismissing the post-conviction petition was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Deputy Defender Amanda Horner, Mt. Vernon.)

### §33-6(a)

**People v. Baker**, 2015 IL App (5th) 110492 (No. 5-11-0492, 2/6/15)

The court accepted the State's concession that under **Miller v. Alabama**, 567 U.S. \_\_\_, 132 S.Ct. 2455, \_\_\_ L.Ed.2d \_\_\_ (2012), the Eighth Amendment was violated by the imposition of mandatory natural life sentences for offenses which defendant committed when he was 15 years old. In remanding for resentencing, the court noted that **Miller** does not foreclose the possibility of life without parole for a juvenile who is convicted of murder provided that the sentencing court has discretion to impose a different penalty and takes into consideration the offender's youth and personal characteristics before imposing sentence.

(Defendant was represented by Assistant Deputy Defender Amanda Horner, Mt. Vernon.)

**§33-6(f)(2)**

**In re Austin S.**, 2015 IL App (4th) 140802 (No. 4-14-0802, 2/9/15)

Under the Juvenile Act, the court may place a minor who has been adjudicated guilty of an offense in detention for up to 30 days. 705 ILCS 405/5-710(1)(a)(v). The Juvenile Act defines detention as the temporary care of a minor who requires secure custody for his or the community's protection in a facility designed to physically restrict the minor's movements. 705 ILCS 405/5-105(5).

Here the trial court ordered, as a condition of defendant's probation, that he successfully complete the Adams County Juvenile Detention Center Treatment Program. The treatment program is designed to last about 90 days although some participants stay in the program longer. The Appellate Court held that the trial court's order was void since it mandated a period of detention that exceeded 30 days.

In **Christopher P.**, 2012 IL App (4th) 100902, the court concluded that time spent in the same treatment program at issue in this case was properly classified as custody for sentence credit purposes. The court found that under the treatment program a minor had a legal duty to submit to state authority, his freedom of movement was restricted by locked doors, he was subject to the same policies and conditions as other detention center residents, including solitary confinement and strip searches, and was completely integrated with the other detention center residents.

Based on **Christopher P.**, the Appellate Court held that the treatment program constituted detention as defined by the Juvenile Act. The treatment program, given its regimented structure, surveillance, and lack of privacy, was no different than any other juvenile detention facility. The trial court's order was thus unauthorized and void since it exceeded 30 days.

(Defendant was represented by Assistant Defender Janieen Terrance, Springfield.)

**REASONABLE DOUBT**

**§42-1**

**In re S.M.**, 2014 IL App (3d) 140687 (No. 3-14-0687, 2/4/15)

1. Defendant was charged in juvenile court with unlawful possession of a concealable handgun by a person under 18 years of age. 720 ILCS 5/24-3.1(a)(1). The State did not present any evidence establishing defendant's age, which was an element of the offense. During closing argument, defendant pointed out this failure, and in rebuttal the State asked the trial court to take judicial notice of the court record showing that the court's juvenile jurisdiction attached for minors under 18 years of age.

The trial court agreed with the State, finding that as a matter of jurisdiction defendant was under 18, otherwise he would have been tried in adult court.

2. The Appellate Court reversed defendant's adjudication, holding that the State failed to prove defendant was under 18, an element of the offense, and that the trial court could not properly fill in that missing proof by taking judicial notice of defendant's age.

Illinois Rule of Evidence 201 allows a trial court to take judicial notice of certain facts which are not subject to reasonable dispute, meaning they are generally known in the local population or are capable of accurate and ready determination by consulting sources of unquestioned accuracy. A court may take judicial notice of its own records, including the status of pleadings in a juvenile proceeding.

3. The State charged defendant in juvenile court, which has exclusive jurisdiction to adjudicate criminal offenses committed by minors under the age of 18, and defendant did not file a motion to dismiss the charges. But procedural silence regarding allegations in a charging document cannot be construed as a judicial admission to an element of the offense. The failure of defendant to contest specific allegations in the charge did not absolve the State of its obligation to prove the elements of an offense.

Additionally, defendant's age was not technically a jurisdictional requirement since juvenile court is simply a division of the circuit court. Defendant's silence with respect to jurisdiction thus did not constitute an admission that he was under 18 at the time of the offense.

4. The Appellate Court rejected the State's argument, made for the first time on appeal, that the trial court could fill in the State's missing proof by taking judicial notice of defendant's unsworn statement during arraignment that he was 16 years old. Not only was the statement unsworn, it was also self-incriminating, since defendant gave the answer in response to a direct question from the court about his age, an element of the offense. If this statement could be considered on appeal to provide the necessary proof of age, it would prevent defendant from any meaningful opportunity to challenge this element at trial, or to challenge the admission of his statement as violating his right against self-incrimination.

5. The Appellate Court also held that the trial court could not take judicial notice of an adjudicative fact without first reopening the evidentiary portion of the trial. Here, defendant pointed out the missing proof during its closing argument. The State was not entitled to have a "do-over" by asking the court in its rebuttal argument to supplement the completed evidence pursuant to judicial notice.

Defendant's conviction was reversed.

(Defendant was represented by Assistant Defender Lucas Walker, Ottawa.)

## SEARCH & SEIZURE

### §§44-1(a), 44-4(c)

**People v. Slaymaker**, 2015 IL App (2d) 130528 (No. 2-13-0528, 2/3/15)

1. Police-citizen encounters are divided into three categories. First, an arrest requires probable cause. Second, a temporary investigative stop under **Terry v. Ohio** requires a reasonable, articulable suspicion of criminal activity. The third category involves consensual encounters which involve no coercion or detention and therefore do not implicate the Fourth Amendment at all.

In addition, the “community caretaking” doctrine may apply when officers are performing some function other than investigating a crime and their actions are reasonable because they are undertaken to protect the safety of the general public.

A frisk for weapons is permitted as part of a **Terry** stop where there is reason to believe that the defendant is armed. Furthermore, a community caretaking event may progress into a **Terry** stop if the officer develops a reasonable suspicion of criminal activity.

2. The court concluded that where defendant was stopped as part of a community caretaking event, subsequent events did not give rise to a reasonable suspicion that he was armed or engaged in criminal activity. The officer stopped defendant because he was walking in the highway median. After ascertaining that defendant did not need assistance, the officer attempted to conduct a pat-down because defendant placed his hand in his pocket. The officer eventually tasered defendant and placed him in handcuffs after he refused to cooperate with the frisk.

The court concluded that once it was determined that defendant did not need assistance, he should have been allowed to go about his business without interference. “The officer was simply not authorized to prolong the encounter in order to frisk defendant for a possible weapon.”

The court rejected the argument that placing a hand in a pocket gave rise to a reasonable suspicion that defendant was armed or engaged in criminal activity. Similarly, the court rejected the claim that a reasonable suspicion was created merely because defendant’s pockets were “bulging.”

Because defendant did not resist an authorized act where the officer conducted an improper frisk during a community caretaking stop, the conviction for resisting a peace officer was reversed.

(Defendant was represented by Assistant Defender Sherry Silvern, Elgin.)

**§44-1(b)**

**People v. Almond**, 2015 IL 113817 (No. 113817, 2/20/15)

A consensual encounter between a citizen and a police officer does not violate the Fourth Amendment. A challenged incident is a seizure, not a consensual encounter, when the police by means of physical force or show of authority restrain a person's movement, such that a reasonable person would not believe he was free to leave. In deciding whether there has been a seizure, courts generally look at four factors: (1) the threatening presence of several officers; (2) the display of weapons; (3) physical touching of the person; and (4) using language or tone of voice to compel compliance. Although these factors are not designed to be exhaustive, the absence of any of the factors is "highly instructive" on whether a seizure has occurred.

The court found that none of the above factors were present in this case. Two officers drove to a liquor store in a marked squad car (although the officers were in plain clothes) and saw defendant and four other men outside the store. As the officers got out of their car, the group of men dispersed. Defendant and two other men went inside the store and the officers followed. One of the officers spoke to the three men, who were standing next to a wall at the back of the store, and asked them what they were doing. The men said they were buying chips. The officer asked why they were at the back of the store, received no answer, and then asked whether they had any weapons or narcotics. Defendant said that he had a gun. Based on this response, the officer searched defendant and recovered a loaded firearm.

Two officers were involved in the encounter, but they were actually outnumbered by the three suspects in the store. Both officers wore plain clothes and neither displayed a weapon. The officers did not physically touch defendant before he said he had a gun, and neither officer used language or a tone of voice that would have compelled defendant to comply with the officers' requests. Although the officers arrived in a marked squad, that fact by itself did not create a threatening presence.

Under these circumstances, the interactions between the officers and defendant was a consensual encounter and no seizure occurred. Once defendant stated that he was armed, the officer properly searched him and recovered the loaded weapon.

(Defendant was represented by Assistant Defender Ginger Odom, Chicago.)

## SENTENCING

### §45-10(e)

**People v. Smith**, 2015 IL 116572 (No. 116572, 2/5/15)

The court concluded that **People v. White**, 2011 IL 109616, which held that the trial court must impose a mandatory sentencing enhancement which is supported by the factual basis for a guilty plea even if the plea agreement provides that the enhancement will not be sought, imposed a “new” rule that does not apply retroactively to convictions which were already final when **White** was decided.

(Defendant was represented by Assistant Defender Mario Kladis, Ottawa.)

### §45-18(c)

**People v. Betance-Lopez**, 2015 IL App (2d) 130521 (No. 2-13-0521, 2/27/15)

Defendant was convicted of two counts of predatory criminal sexual assault of a child and one count of aggravated criminal sexual abuse. At sentencing, the trial court declined to impose a sentence for aggravated criminal sexual abuse, finding that the conviction merged with predatory criminal sexual assault of a child. On appeal, the State argued for the first time that the trial court incorrectly concluded that aggravated criminal sexual abuse was a less-included offense of predatory criminal sexual assault of a child and asked the court to remand the cause for sentencing on the former count.

The court acknowledged that where a criminal defendant appeals a conviction, the reviewing court has authority to grant the State’s request to remand for imposition of a sentence on a conviction that was improperly vacated under one-act, one-crime principles. However, the court concluded that defendant was prejudiced by the State’s failure to raise the issue in the trial court because he would be subject to mandatory consecutive sentencing if the State’s request was granted. Noting that defendant might have decided to not appeal had the State raised the issue below, the court declined to overlook the State’s waiver.

(Defendant was represented by Assistant Defender Yasmin Eken, Chicago.)



## SEX OFFENSES

### §46-7

**People v. Cowart**, 2015 IL App (1st) 131073 (No. 1-13-1073, 2/17/15)

Before accepting a guilty plea, the trial court must admonish the defendant about the direct consequences of his plea; the court does not need to admonish the defendant about collateral consequences. A direct consequence “has a definite, immediate and largely automatic effect” on defendant’s punishment. Illinois courts have held that mandatory sex offender registration is a collateral consequence, since it is neither a restraint on liberty nor a punishment.

Defendant argued that the reasoning of **Padilla v. Kentucky**, 559 U.S. 356 (2010) should be extended to require a trial court to admonish a defendant who is pleading guilty about mandatory sex offender registration. In **Padilla**, the defendant argued that his trial counsel was ineffective for failing to inform him that his guilty plea made him eligible for deportation. The United States Supreme Court held that even though deportation is a civil consequence of a guilty plea, given its enmeshment with criminal law, it could not be “categorically removed” from defense counsel’s duty to provide proper advice to a client who is pleading guilty.

The Appellate Court rejected defendant’s argument. It held that unlike deportation, sex offender registration is not a punishment or restraint on liberty. Registration remains a collateral consequence and thus there was no need for admonitions about it. Additionally, **Padilla** involved an issue about ineffective assistance of counsel, not trial court admonitions. Since defendant raised no claim about ineffective counsel, **Padilla** does not change the outcome.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)

## SPEEDY TRIAL

### §47-3

**People v. Raymer**, 2015 IL App (5th) 130255 (No. 5-13-0255, 2/25/15)

1. 725 ILCS 5/103-5(e) provides that where a defendant is simultaneously in custody on unrelated charges, the State may elect to try one of the charges within the normal statutory speedy trial period. The prosecution is then afforded an additional 160 days to bring the defendant to trial on the remaining charges. The intent of §103-5(a) is to preserve the defendant’s right to a speedy trial while mitigating the State’s burden to prepare more than one charge for trial.

The court rejected the State's argument that the prosecutor's election of a charge to try first tolls the speedy trial term on the remaining charges, so that the term on those charges does not run even if the State fails to bring the first charge to trial. The court concluded that the State must try or obtain a guilty plea on at least one of the pending charges within the normal speedy trial period. If it does so, it receives another 160 days to try the remaining charges.

2. Where the State elected to try a driving on revoked license charge first, but the 120-day speedy trial term expired on that offense without the State either bringing the case to trial or obtaining a guilty plea, the 120-day speedy trial terms also expired on escape and unlawful use of a credit card charges which the State had elected to try second. "The State cannot obtain more time to try the unelected charges by virtue of its own failure to bring the elected charge to trial within the requisite time."

The trial court's order dismissing all of the charges was affirmed.

(Defendant was represented by Assistant Defender Larry O'Neill, Mt. Vernon.)

## STATUTES

### §48-1

**In re Jordan G.**, 2015 IL 116834 (No. 118634, 2/20/15)

Whether parts of a statute that have been declared unconstitutional may be severed from the rest of the statute involves questions of statutory interpretation and legislative intent. Where a statute does not contain its own severability provision, the severability section of the Statute on Statutes is utilized. That statute provides that the invalidity of one provision of a statute does not affect other provisions which can be given effect without the invalid provision. (5 ILCS 70/1.31).

### §48-1

**People v. Mosley**, 2015 IL 115872 (No. 115872, 2/20/15)

The issue of severability involves questions of statutory interpretation and legislative intent. Where a statute does not contain its own severability provision, the severability section of the Statute on Statutes is utilized. That statute provides that the invalidity of one provision of a statute does not affect other provisions which can be given effect without the invalid provision. (5 ILCS 70/1.31).

(Defendant was represented by Assistant Defender Gilbert Lenz, Chicago.)

## TRIAL PROCEDURES

### §52-7

**People v. Shines**, 2014 IL App (1st) 121070 (No. 1-12-1070, 2/4/15)

More than 30 days after he had been sentenced, defendant filed a *pro se* letter titled “motion of appeal” in the trial court alleging that counsel had been ineffective. The trial court took no action on the letter. The Illinois Supreme Court eventually granted defendant’s motion for supervisory order directing the Appellate Court to allow defendant’s letter “to stand as a validly filed notice of appeal.”

1. Defendant argued on appeal that the trial court failed to conduct a **Krankel** hearing on defendant’s *pro se* claims of ineffectiveness. The Appellate Court held that since defendant’s letter was filed more than 30 days after the final judgment, the trial court no longer had jurisdiction to rule on defendant’s claims.

A trial court generally loses jurisdiction 30 days after the entry of a final judgement. Here the court entered the final judgment on March 7 when it sentenced defendant and lost jurisdiction on Friday, April 6. Defendant filed his letter on Monday, April 9, more than 30 days after the final judgment had been entered.

2. The Appellate Court rejected defendant’s argument that the letter was filed within 30 days under the mailbox rule. Under that rule, pleadings are timely filed on the day an incarcerated defendant places them in the prison mail system. Defendant argued that his letter was timely because it was filed on Monday, April 9, and thus with no Sunday mail, it could only be untimely if it had been placed in the prison mail system on Saturday, April 7 and then delivered halfway across the State by Monday, April 9, an impossible scenario.

The mailbox rule, however, does not permit such speculation. Instead, the rule requires a defendant to provide proof of mailing by filing a proof of service with “an affidavit stating the time and place of mailing, the address on the envelope, and the fact that proper postage was prepaid.” Since defendant did not file such an affidavit with his letter, he could not utilize the mailbox rule.

3. The court refused to take judicial notice of an affidavit submitted with defendant’s motion for supervisory order. The affidavit, attached as an exhibit to defendant’s reply brief, was from a paralegal who averred that a manager at the prison where defendant was incarcerated informed her that defendant’s letter was mailed on April 3. The court held that it could not properly consider attachments to briefs that were not included in the record. Additionally, the content of the affidavit was entirely hearsay and thus insufficient to establish the date of mailing.

4. Defendant also argued that since the paralegal’s affidavit was attached to the motion for a supervisory order, which was uncontested by the State and granted by the Supreme Court, the issue of when the letter was mailed had already been litigated and

decided, and cannot be relitigated now. The supervisory order, however, did not reflect that the Supreme Court decided when the letter was mailed or whether it was timely filed in the trial court. The Supreme Court merely allowed the letter to serve as a validly filed notice of appeal.

Defendant's letter was therefore not timely filed and the trial court had no jurisdiction to consider his allegations of ineffective assistance of counsel.

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

## UNLAWFUL USE OF WEAPONS

### §53-1

**In re Jordan G.**, 2015 IL 116834 (No. 118634, 2/20/15)

The respondent minor was charged in a delinquency petition with three counts of aggravated unlawful use of a weapon and one count of unlawful possession of a firearm. The AUUW counts alleged that respondent carried an uncased, loaded, and immediately accessible firearm in a vehicle (§24-1.6(a)(1), (a)(3)(A)), carried a handgun in a vehicle while he was under the age of 21 (720 ILCS 5/24-1.6(a)(1), (a)(3)(I)), and carried a firearm in a vehicle without having been issued a FOID card (720 ILCS 5/24-1.6(a)(1), (a)(3)(C).) The unlawful possession of a firearm count alleged that respondent was under the age of 18 years and carried a firearm which was capable of being concealed on his person (720 ILCS 5/24-3.1(a)(1)).

The trial court dismissed the three AUUW counts after finding that §24-1.6 had been found facially unconstitutional on Second Amendment grounds in **Moore v. Madigan**, 702 F.3d 933 (7th Cir. 2012).

1. The Supreme Court concluded that **Moore** and **People v. Aguilar**, 2013 IL 112116, held only that the Second Amendment was violated by a “blanket prohibition on carrying weapons in public.” In fact, the modified **Aguilar** opinion specifically stated that the holding was limited to finding that the Class 4 form of AUUW (720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d)) was facially unconstitutional because it enacted a comprehensive ban on the possession of an uncased, loaded and immediately accessible firearm. Both **Moore** and **Aguilar** specifically noted that reasonable restrictions on Second Amendment rights are permitted.

2. The court rejected the argument that the FOID and “under 21” provisions cannot be severed from the provision found unconstitutional in **Aguilar**. The issue of severability involves questions of statutory interpretation and legislative intent. Where a statute does not contain its own severability provision, the severability section of the Statute on Statutes is utilized. That statute provides that the invalidity of one

provision of a statute does not affect other provisions which can be given effect without the invalid provision. (5 ILCS 70/1.31).

The Supreme Court concluded that AUUW is comprised of carrying a weapon (subsections (a)(1) and (a)(2)) where one of several factors is present, including that the firearm is uncased, loaded and immediately accessible, the person possessing the firearm does not have a FOID card, or the person possessing the weapon is under the age of 21. Thus, subsection (a)(3)(A), which was invalidated in **Aguilar**, is just one of several aggravating factors that can operate in conjunction with subsections (a)(1) and (a)(2) to constitute the substantive AUUW offense. The court concluded that removing the provision struck down by **Aguilar** does not undermine the remaining factors, which can be executed on their own. Thus, the FOID card and “under 21” restriction stand independently of the provision that was held unconstitutional in **Aguilar**.

3. When analyzing a Second Amendment challenge, the court applies a two-step process. First, the court conducts a textual and historical analysis to determine whether the challenged law imposes a burden on conduct that was understood to be within the scope of the Second Amendment’s protection at the time of ratification. If the challenged law regulates activity which fell outside the scope of the Second Amendment right as it was understood at the relevant historical time, the regulated activity is categorically unprotected and is not subject to further Second Amendment review.

If the historical evidence is inconclusive or suggests that the regulated activity is protected, then the court must apply the appropriate level of scrutiny and inquire into the strength of the State’s justification for regulating or restricting the activity.

The defense acknowledged that the possession of weapons by persons under the age of 18 falls outside the protection of the Second Amendment, but argued that the Second Amendment rights of persons between the ages of 18 and 21 are violated by subsections (a)(1), (a)(3)(C) and (a)(1), (a)(3)(I), which restrict the possession of weapons by persons under the age of 21.

The court concluded that there is no recognized right for minors to own and possess firearms, and that restrictions on the ability of minors to possess weapons have traditionally been interpreted as lasting until age 21. Thus, the possession of handguns by persons between 18 and 21 constitutes conduct that is outside the scope of Second Amendment protection.

4. The court rejected the State’s request that it modify the **Aguilar** holding that the Class 4 form of aggravated unlawful use of a weapon is unconstitutional on its face.

### **§53-1**

**People v. Almond**, 2015 IL 113817 (No. 113817, 2/20/15)

Defendant, a convicted felon, was properly convicted of two separate firearm offenses based on his simultaneous possession of a firearm and the firearm ammunition that was loaded in the gun. The court held that the UUW by a felon statute specifically authorizes two separate convictions for simultaneously possessing a firearm and firearm ammunition, and the two convictions did not violate the one act/one crime rule.

1. The UUW by a felon statute makes it unlawful for a person who has been convicted of a felony to possess any firearm or firearm ammunition. 720 ILCS 5/24-1.1(a). The statute specifically states that “the possession of each firearm or firearm ammunition in violation of this Section constitutes a single and separate violation.” 720 ILCS 5/24-1.1(e). The court held that based on this language, the statute unambiguously authorizes separate convictions when a felon possesses a loaded firearm: a conviction for possessing the firearm, and a conviction for possessing the ammunition inside the firearm.

2. The court also held that multiple convictions did not violate the one act/one crime rule. Under that rule, a defendant may not be convicted of multiple offenses based on the same physical act. But multiple convictions are permitted in cases where a defendant commits several acts, even if they are interrelated. An act is defined as any overt or outward manifestation that will support a conviction.

Here defendant possessed two separate and distinct items of contraband, a firearm and ammunition. Although his possession was simultaneous, that fact alone did not render his conduct a single act. Instead, defendant committed two separate acts: possession of a firearm and possession of ammunition. Each act was materially different, even if both items were possessed simultaneously.

Defendant’s multiple convictions were affirmed.

(Defendant was represented by Assistant Defender Ginger Odom, Chicago.)

### **§53-1**

**People v. Mosley**, 2015 IL 115872 (No. 115872, 2/20/15)

To convict a defendant of aggravated unlawful use of a weapon, the State must prove beyond a reasonable doubt that the defendant was either carrying a firearm on his person or in his vehicle (720 ILCS 5/24-1.6(a)(1)) or was carrying or possessing a firearm while on a public way (720 ILCS 5/24-1.6(a)(2)), and that one of the factors set forth in subsection (a)(3) exists. Defendant was charged with three factors here: (1) the

firearm was uncased, loaded and immediately accessible ((a)(3)(A)), (2) defendant had not been issued a valid FOID card ((a)(3)(C)); and (3) the firearm was a handgun and defendant was under 21 and was not engaged in lawful activities under the Wildlife Code ((a)(3)(I)). Section 24-1.6(d) provides that AUUW is a Class 4 felony unless certain circumstances mandate a greater sentence.

1. The court concluded that under **Aguilar**, defendant's convictions for carrying an uncased, loaded firearm on his person and on a public way were unconstitutional. Therefore, the trial court properly vacated those convictions. However, the court rejected the argument that the FOID card and under 21 provisions were inseverable from the above offenses.

The issue of severability involves questions of statutory interpretation and legislative intent. Where a statute does not contain its own severability provision, the severability section of the Statute on Statutes is utilized. That statute provides that the invalidity of one provision of a statute does not affect other provisions which can be given effect without the invalid provision. (5 ILCS 70/1.31).

The Supreme Court concluded that removing the provision struck down by **Aguilar** does not undermine the remaining factors, which can be executed on their own. Because the FOID card and "under 21" restriction stand independently of the provision that was held unconstitutional in **Aguilar**, both provisions are severable.

2. When analyzing a Second Amendment challenge, the court applies a two-step process. First, the court conducts a textual and historical analysis to determine whether the challenged law imposes a burden on conduct that was understood to be within the scope of the Second Amendment's protection at the time of ratification. If the challenged law regulates activity which fell outside the scope of the Second Amendment right as it was understood at the relevant historical time, the regulated activity is categorically unprotected and is not subject to further Second Amendment review.

If the historical evidence is inconclusive or suggests that the regulated activity is protected, then the court must apply the appropriate level of scrutiny and inquire into the strength of the State's justification for regulating or restricting the activity.

The defense acknowledged that the possession of weapons by persons under the age of 18 falls outside the protection of the Second Amendment, but argued that the Second Amendment rights of persons between the ages of 18 and 21 are violated by subsections (a)(1), (a)(3)(C) and (a)(1), (a)(3)(I), which restrict the possession of weapons by persons under the age of 21.

The court concluded that there is no recognized right for minors to own and possess firearms, and that restrictions on the ability of minors to possess weapons have traditionally been interpreted as lasting until age 21. Thus, the possession of handguns

by persons between 18 and 21 constitutes conduct that is outside the scope of Second Amendment protection.

The court also found that the FOID card requirement is a reasonable and legitimate regulation of the right to possess weapons.

3. The court rejected the argument that equal protection is violated by the distinction in subsections (a)(3)(C) and (a)(3)(I) between persons who are over and under 21 years of age. The court rejected the argument that strict scrutiny applies and found that there is a rational basis for the distinction because: (1) the State has a legitimate interest in protecting the public and police from the possession and use of dangerous weapons, and (2) given the immaturity and impulsivity of youth, that interest is served by restricting the possession of weapons by persons under the age of 21.

4. The court declined to consider whether the FOID card provision violates due process as applied to persons between the age of 18 and 20, finding that the record was insufficient to support the argument. The court also noted that persons who are under 21 and who wish to obtain a FOID card may either obtain the consent of their parents or appeal to the Director of the State Police.

5. 720 ILCS 5/24-1.6(d)(2) provides that where the defendant is 18 years of age or older and the factors listed in both (A) and (C) are present, a first conviction of AUUW is a Class 4 felony carrying a minimum sentence of one year. The court found that the mandatory sentence factor was unconstitutional because subsection (d)(2) incorporates the offense created by subsection (a)(3)(A), which was held to be unconstitutional in **Aguilar**. However, the court concluded that the provisions of the statute were severable from the impermissible mandatory minimum sentencing term of (d)(2), and that the remainder of the AUUW statute therefore remains in effect.

(Defendant was represented by Assistant Defender Gilbert Lenz, Chicago.)

### **§53-1**

**In re S.M.**, 2014 IL App (3d) 140687 (No. 3-14-0687, 2/4/15)

1. Defendant was charged in juvenile court with unlawful possession of a concealable handgun by a person under 18 years of age. 720 ILCS 5/24-3.1(a)(1). The State did not present any evidence establishing defendant's age, which was an element of the offense. During closing argument, defendant pointed out this failure, and in rebuttal the State asked the trial court to take judicial notice of the court record showing that the court's juvenile jurisdiction attached for minors under 18 years of age. The trial court agreed with the State, finding that as a matter of jurisdiction defendant was under 18, otherwise he would have been tried in adult court.



2. The Appellate Court reversed defendant's adjudication, holding that the State failed to prove defendant was under 18, an element of the offense, and that the trial court could not properly fill in that missing proof by taking judicial notice of defendant's age.

Illinois Rule of Evidence 201 allows a trial court to take judicial notice of certain facts which are not subject to reasonable dispute, meaning they are generally known in the local population or are capable of accurate and ready determination by consulting sources of unquestioned accuracy. A court may take judicial notice of its own records, including the status of pleadings in a juvenile proceeding.

3. The State charged defendant in juvenile court, which has exclusive jurisdiction to adjudicate criminal offenses committed by minors under the age of 18, and defendant did not file a motion to dismiss the charges. But procedural silence regarding allegations in a charging document cannot be construed as a judicial admission to an element of the offense. The failure of defendant to contest specific allegations in the charge did not absolve the State of its obligation to prove the elements of an offense.

Additionally, defendant's age was not technically a jurisdictional requirement since juvenile court is simply a division of the circuit court. Defendant's silence with respect to jurisdiction thus did not constitute an admission that he was under 18 at the time of the offense.

4. The Appellate Court rejected the State's argument, made for the first time on appeal, that the trial court could fill in the State's missing proof by taking judicial notice of defendant's unsworn statement during arraignment that he was 16 years old. Not only was the statement unsworn, it was also self-incriminating, since defendant gave the answer in response to a direct question from the court about his age, an element of the offense. If this statement could be considered on appeal to provide the necessary proof of age, it would prevent defendant from any meaningful opportunity to challenge this element at trial, or to challenge the admission of his statement as violating his right against self-incrimination.

5. The Appellate Court also held that the trial court could not take judicial notice of an adjudicative fact without first reopening the evidentiary portion of the trial. Here, defendant pointed out the missing proof during its closing argument. The State was not entitled to have a "do-over" by asking the court in its rebuttal argument to supplement the completed evidence pursuant to judicial notice.

Defendant's conviction was reversed.

(Defendant was represented by Assistant Defender Lucas Walker, Ottawa.)

## VENUE & JURISDICTION

### CH. 54

**People v. Shines**, 2014 IL App (1st) 121070 (No. 1-12-1070, 2/4/15)

More than 30 days after he had been sentenced, defendant filed a *pro se* letter titled “motion of appeal” in the trial court alleging that counsel had been ineffective. The trial court took no action on the letter. The Illinois Supreme Court granted defendant’s motion for supervisory order directing the Appellate Court to allow defendant’s letter “to stand as a validly filed notice of appeal.”

1. Defendant argued on appeal that the trial court failed to conduct a **Krankel** hearing on defendant’s *pro se* claims of ineffectiveness. The Appellate Court held that since defendant’s letter was filed more than 30 days after the final judgment, the trial court no longer had jurisdiction to rule on defendant’s claims.

A trial court generally loses jurisdiction 30 days after the entry of a final judgement. Here the court entered the final judgment on March 7 when it sentenced defendant and lost jurisdiction on Friday, April 6. Defendant filed his letter on Monday, April 9, more than 30 days after the final judgment had been entered.

2. The Appellate Court rejected defendant’s argument that the letter was filed within 30 days under the mailbox rule. Under that rule, pleadings are timely filed on the day an incarcerated defendant places them in the prison mail system. Defendant argued that his letter was timely because it was filed on Monday, April 9, and thus with no Sunday mail, it could only be untimely if it had been placed in the prison mail system on Saturday, April 7 and then delivered halfway across the State by Monday, April 9, an impossible scenario.

The mailbox rule, however, does not permit such speculation. Instead, the rule requires a defendant to provide proof of mailing by filing a proof of service with “an affidavit stating the time and place of mailing, the address on the envelope, and the fact that proper postage was prepaid.” Since defendant did not file such an affidavit with his letter, he could not utilize the mailbox rule.

3. The court refused to take judicial notice of an affidavit submitted with defendant’s motion for supervisory order. The affidavit, attached as an exhibit to defendant’s reply brief, was from a paralegal who averred that a manager at the prison where defendant was incarcerated informed her that defendant’s letter was mailed on April 3. The court held that it could not properly consider attachments to briefs that were not included in the record. Additionally, the content of the affidavit was entirely hearsay and thus insufficient to establish the date of mailing.

4. Defendant also argued that since the paralegal’s affidavit was attached to the motion for a supervisory order, which was uncontested by the State and granted by the

Supreme Court, the issue of when the letter was mailed had already been litigated and decided, and cannot be relitigated now. The supervisory order, however, did not reflect that the Supreme Court decided when the letter was mailed or whether it was timely filed in the trial court. The Supreme Court merely allowed the letter to serve as a validly filed notice of appeal.

Defendant's letter was therefore not timely filed and the trial court had no jurisdiction to consider his allegations of ineffective assistance of counsel.

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

## VERDICTS

### §55-3(a)

**People v. Betance-Lopez**, 2015 IL App (2d) 130521 (No. 2-13-0521, 2/27/15)

Defendant was convicted of two counts of predatory criminal sexual assault of a child and one count of aggravated criminal sexual abuse. At sentencing, the trial court declined to impose a sentence for aggravated criminal sexual abuse, finding that the conviction merged with predatory criminal sexual assault of a child. On appeal, the State argued for the first time that the trial court incorrectly concluded that aggravated criminal sexual abuse was a less-included offense of predatory criminal sexual assault of a child and asked the court to remand the cause for sentencing on the former count.

The court acknowledged that where a criminal defendant appeals a conviction, the reviewing court has authority to grant the State's request to remand for imposition of a sentence on a conviction that was improperly vacated under one-act, one-crime principles. However, the court concluded that defendant was prejudiced by the State's failure to raise the issue in the trial court because he would be subject to mandatory consecutive sentencing if the State's request was granted. Noting that defendant might have decided to not appeal had the State raised the issue below, the court declined to overlook the State's waiver.

(Defendant was represented by Assistant Defender Yasmin Eken, Chicago.)

**§55-3(b)**

**People v. Almond**, 2015 IL 113817 (No. 113817, 2/20/15)

Defendant, a convicted felon, was properly convicted of two separate firearm offenses based on his simultaneous possession of a firearm and the firearm ammunition that was loaded in the gun. The court held that the UUW by a felon statute specifically authorizes two separate convictions for simultaneously possessing a firearm and firearm ammunition, and the two convictions did not violate the one act/one crime rule.

1. The UUW by a felon statute makes it unlawful for a person who has been convicted of a felony to possess any firearm or firearm ammunition. 720 ILCS 5/24-1.1(a). The statute specifically states that “the possession of each firearm or firearm ammunition in violation of this Section constitutes a single and separate violation.” 720 ILCS 5/24-1.1(e). The court held that based on this language, the statute unambiguously authorizes separate convictions when a felon possesses a loaded firearm: a conviction for possessing the firearm, and a conviction for possessing the ammunition inside the firearm.

2. The court also held that multiple convictions did not violate the one act/one crime rule. Under that rule, a defendant may not be convicted of multiple offenses based on the same physical act. But multiple convictions are permitted in cases where a defendant commits several acts, even if they are interrelated. An act is defined as any overt or outward manifestation that will support a conviction.

Here defendant possessed two separate and distinct items of contraband, a firearm and ammunition. Although his possession was simultaneous, that fact alone did not render his conduct a single act. Instead, defendant committed two separate acts: possession of a firearm and possession of ammunition. Each act was materially different, even if both items were possessed simultaneously.

Defendant’s multiple convictions were affirmed.

(Defendant was represented by Assistant Defender Ginger Odom, Chicago.)

**WAIVER – PLAIN ERROR – HARMLESS ERROR**

**§§56-1(a), 56-1(b)(9)(b)**

**People v. Cowart**, 2015 IL App (1st) 131073 (No. 1-13-1073, 2/17/15)

1. Defendant filed a post-conviction petition attacking his guilty plea by arguing that the trial court failed to properly admonish him that he would have to register as

a sex offender. The State argued that defendant forfeited this issue by failing to raise it on direct appeal.

The Appellate Court rejected the State's argument. Post-conviction claims that could have been raised on direct appeal are forfeited, but the failure to file any appeal at all does not forfeit such issues. For purposes of post-conviction forfeiture, a summary remand on direct appeal for non-compliance with Rule 604(d) is treated as if defendant filed no appeal at all. Here, on direct appeal, defendant's case was remanded for compliance with Rule 604(d) and thus his direct appeal was the equivalent of filing no appeal at all. Defendant therefore did not forfeit his post-conviction claim.

2. The court also rejected the State's argument that defendant's second-stage post-conviction petition was properly dismissed because he provided no affidavits or other support for his claims. The State forfeits a non-jurisdictional procedural challenge to a post-conviction petition by failing to raise that challenge in its motion to dismiss.

Here the State made no argument in its motion to dismiss about the lack of affidavits or other support for defendant's claim. The court noted that had the State raised this issue in the circuit court, defendant could have supplied the affidavits. By failing to raise this issue, the State forfeited its argument on appeal.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)

**§§56-1(b)(1)(a), 56-1(b)(4)(a)**

**People v. Betance-Lopez**, 2015 IL App (2d) 130521 (No. 2-13-0521, 2/27/15)

Defendant was convicted of two counts of predatory criminal sexual assault of a child and one count of aggravated criminal sexual abuse. At sentencing, the trial court declined to impose a sentence for aggravated criminal sexual abuse, finding that the conviction merged with predatory criminal sexual assault of a child. On appeal, the State argued for the first time that the trial court incorrectly concluded that aggravated criminal sexual abuse was a less-included offense of predatory criminal sexual assault of a child and asked the court to remand the cause for sentencing on the former count.

The court acknowledged that where a criminal defendant appeals a conviction, the reviewing court has authority to grant the State's request to remand for imposition of a sentence on a conviction that was improperly vacated under one-act, one-crime principles. However, the court concluded that defendant was prejudiced by the State's failure to raise the issue in the trial court because he would be subject to mandatory consecutive sentencing if the State's request was granted. Noting that defendant might

have decided to not appeal had the State raised the issue below, the court declined to overlook the State's waiver.

(Defendant was represented by Assistant Defender Yasmin Eken, Chicago.)

**§56-1(b)(3)(b)**

**People v. Almond**, 2015 IL 113817 (No. 113817, 2/20/15)

Defendant did not forfeit his Fourth Amendment issue by failing to include it in a post-trial motion. Constitutional issues that were previously raised at trial and could be raised later in a post-conviction petition are not subject to forfeiture on direct appeal simply because they were not included in a post-trial motion.

(Defendant was represented by Assistant Defender Ginger Odom, Chicago.)